88-1535

Supreme Court, U.S.
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No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CALVIN L. PARKER, et al,

Petitioner,

v.

CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March, 1989

QUESTIONS PRESENTED

1. When a court of appeals finds that a district court has violated 28 USC Section 455(a) by knowingly assigning a law clerk to review massive discovery materials, hold a hearing in the absence of the judge and "formulate" the court's opinion granting summary judgment in favor of the defendants, in a case wherein the law clerk's father, a former clerk of the same district judge, is a principal partner in the law firm representing the defendants, may the court of appeals nevertheless directly address the merits of the summary judgment in the defendants' favor and refuse to grant the plaintiffs any relief, holding that the Section 455(a), and possible 455(b)(5)(iii), violation, are harmless error because the court of appeals agrees with the district court's order granting summary judgment?

2. Does 28 USC 455(b)(5)(iii), which would automatically disqualify a judge whose father is a lawyer in a case, also disqualify a district court judge who authorizes his law clerk, whose father is a senior partner in the law firm representing the defendants, to review massive discovery materials, hold a hearing in the absence of the judge and "formulate" the court's opinion granting summary judgment in favor of the defendants?

3. When a district judge is in violation of Section 455(b)(5)(iii), which requires mandatory recusal of the judge, and the judge hears the case and grants summary judgment for the defendants, is the judge's failure to recuse himself merely "harmless error" and without remedy on appeal where the court of appeals addresses

the merits of the district court's summary judgment order and agrees with the district judge's ruling.

4. Whether summary judgment is properly granted in favor of defendant labor Union on a failure of fair representation claim when there is substantial evidence before the court that the Union, urging ratification of a wage and benefit concession intentionally misrepresented to its members the concession provisions in order to secure a favorable ratification vote from the members.

5. Whether summary judgment is properly granted in favor of defendant labor union on a failure of fair representation claim when there is substantial evidence before the district court that the Union negotiated drastic wage and benefit concessions to the Company for the alleged purpose of saving the Company sufficient money to keep it from closing, when the Union failed to negotiate any financial standard which, if attained, would oblige the Company to remain open, failed to examine the books, records, and internal reports of the company to determine if there was a reasonable possibility that the Company would continue its operation if the requested concessions were granted, and, in violation of its own standard procedures and against the advice of its research director, knowingly failed to require pay back of the concession if the Company closed its operation despite the concessions.

6. Whether summary judgment is properly granted in favor of defendant Company on breach of contract and fraud claims by union members against the Company when there is substantial

evidence before the court that the Company obtained wage and benefit concessions in wages and benefits from union members by misrepresenting to said union members that the concessions might make it financially possible for the Company to continue operations, when in fact the Company had decided prior to requesting or obtaining said wage and benefit concessions not to continue operating the company and had decided not to make the necessary investments to keep the Company open.

THE PARTIES BELOW

The parties are Calvin L. PARKER; Gene A. Childers; Maple L. Copeland; Will Goodman; Nathaniel Grant; Thomas Ray Loveless; Ruben I. Pierce; Joe D. Pressley; Virgil Lee Weatherspoon, on their own behalf and on behalf of all other hourly wage employees of Connors Steel Company similarly situated, and as representatives of a class of persons consisting of those employees who on or after June 1, 1982, were employed as hourly wage earners by Connors Steel Company and represented by the United Steelworkers of America, AFL-CIO and its Local Union No. 2250, and CONNORS STEEL COMPANY; H. K. Porter Company, Inc.; and United Steelworkers of America, AFL0-CIO, CLC, and Carl L. Statum; Tom Kimbrell; and James E. Norman.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is printed as Appendix A. The memorandum of opinion of the United States District Court for the Northern District of Alabama, Southern Division is printed as Appendix C.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered September 29, 1988. The timely petition for rehearing by the petitioners was denied by the Eleventh Circuit Court of Appeals on December 14, 1988 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTES INVOLVED

28 U.S.C. Section 455 (Appendix R), the National Labor Relations Act, Section 7 and Section 8, 29 U.S.C. 151, et. seq., and the Labor Management Relations Act, Section 301, 29 U.S.C. 141, et. seq.

STATEMENT OF THE CASE

Petitioners note that this is a complex case with massive discovery. Space limitations prevent review of more than a minimal illustrative sampling of the evidence which establishes many genuine disputes of material fact which make summary judgment inappropriate. The 28 USC 455(a) and 455(b) questions overshadow any finding to the contrary.

On August 31, 1983, the defendant, Connors Steel Company, a wholly owned subsidiary of H. K. Porter Company, terminated its operations. Connors had previously operated two plants, one in Huntington, West Virginia, and one in Birmingham, Alabama. Plaintiffs were hourly employees among the 600 at the Birmingham plant and members of the United Steelworkers of America, the bargaining unit representative. [1]

In the spring of 1981, Porter and Connors (hereinafter the Company) represented to the Steelworkers (hereinafter the Union) that because of its financial condition the Huntington plant would be closed unless the Union granted the Company an extension of the existing contract. This concession was made.

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[1] Plaintiffs sought class certification. The district court refused,in clear violation of **Eisen v. Carlisle & Jacquelin**, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), to certify a class of all hourly wage employees because of his perceived lack of meri. to the claims asserted.

Nevertheless, the Huntington plant was closed, the announcement being made in May of 1982. (App. P, pp. 1-2).

The Company then represented that unless wage and benefit concessions were made, the Birmingham plant would be closed. (App. N, pp. 72, 78, 83-84). The employees voted to accept benefit concessions ("Concession I"), including a 20% wage reduction. (App. Q, p. 6). In February, 1983, the Company represented that unless additional wage and benefit concessions were made, it would close the Birmingham plant. The employees voted for a second concession ("Concession II"), which included another 20% wage reduction. (App. S,)

Negotiations began in May of 1983 for a new collective bargaining agreement. A number of new concessions were demanded by the Company, including for the first time that the Company have the unilateral right to cancel any contract on thirty days notice. (App. K, pp. 138-144). The employees refused and the Company closed the Birmingham plant.

Plaintiffs claim that the Company made the decision to close before the first concessions were demanded and that the purpose of the concessions was to reduce the cost of closing Connors.

THE COMPANY FRAUD

On June 1, 1982, the Company represented it was losing

money and asked for concessions. The Union, without verifying financial data, recommended the concessions.[2]

In the spring of 1982, the Company employed an expert, Brown, to evaluate Connors.[3] The Company concealed the report. It provides three "Scenarios." The first, to continue the operations of Connors during the first six months of 1982 **with no further capital investment:**

> "Scenario I offers nothing. With the break even at eighty percent of capacity, only best economic conditions can provide profit. And the business is too sensitive to market variations beyond the control of Connors. Continuing changes in market prices, controlled by seemingly irresponsible action of some mini-mill operators, will always keep Connors in a condition of feast or famine without ever knowing what the immediate future will bring. **The risks are too great to continue operations."** (Emphasis supplied) (App. U, 17). Scenario II is really a holding operation to provide a tee-off point whenever the Company is ready to go ahead with the Scenario III plan. A near-term revival of the economy would produce significantly better profit results than those projected because of additional volume. But, with-

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[2] At the meeting of June 1, 1982, it was agreed that Union auditors could examine Connors' books to verify the information presented by Connors and Porter. No effort was made by the Union to do so. The only financial data ever examined by the Union research department prior to Concession I was a packet of Company produced in-house unaudited balance sheets and income statements. (App. M, pp. 1,2, 9). However, the Union intentionally misrepresented to the employees that it had examined all relevant financial data and that Connors was in fact in the claimed financial difficulty. This was not true as Connors was in good financial condition at that time. (App. T, pp. 1,2)

[3] (BROWN REPORT) (Received by the Company about August 31, 1982).

> out time to consolidate the changes needed in attitude and practice to assure continuation of the thirty percent proportion of Class II product, **the business could be expected to revert to Scenario I with its inherent weakness.** (App. U, p. 17) (Emphasis supplied)

Scenario III, the only viable option, required an investment of $14.6 million dollars during 1983 through 1985 to make Connors a viable company. (App. U, p. 14).[4] Mr. Keith Garrity, president and chief executive officer of Porter, admitted the Company never made the decision to make the investment. (App. K, pp. 5-7).

The Company again asked for concessions in a fraudulent letter to the employees dated February 9, 1983:

> "Please understand that if you do not authorize them [the Union] to enter into negotiations, you are in effect saying to your Committee and to us that you are not willing to make any concessions whatsoever **to keep Connors in operation**. If this is your decision — and we sincerely hope that it is not — then we are obligated to inform you that Connors will have no alternative but to cease operations." (Emphasis supplied.) (App. V, pp. 1-2).

Garrity admitted in a memorandum dated October 4, 1982, that he knew it was impossible for wage and benefit concessions to be obtained in an amount sufficient to reduce Connors' losses to a break even point. He pointed out that if the losses in September

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[4]The Brown Report does establish that Connors was viable if the necessary investment and the concentrated effort was made. Only Mr. Garrity "required" the closing of Connors.

of 1982 were divided by the number of employees, each employee would have to give up wages for that month in the average amount of $1,354.17 "Some employees would receive zero (-0-) pay for the month." (App. L p. 1).

THE UNION FAILURE OF FAIR REPRESENTATION

The Union made no effort to negotiate any financial standard which, if attained, would oblige the Company to keep Connors open; it did not examine the books and records of Connors until after Concessions I and II were executed; it never asked if there was a study such as the Brown Report; contrary to its own standard procedures, it failed to require return of the benefits and wages conceded if the plant closed; it lied to the employees to secure ratification of the concessions.

Oliver Montgomery, the Union official in charge of examing Connors' records, never examined any, relying only on summaries from the Company; he testified that the 1981 financial performance of Connors justified concessions, though Connors made a profit of $3,520,294.00 in 1981 (App. M, p. 9); he testified independent CPA's were not sent to examine the books until after the Concession II agreement was executed, because "it wasn't deemed necessary, that is all I can say." (App. M, pp. 10-11); he

testified the Birmingham plant was "going obsolete," apparently unaware that $12,000,000.00 had been invested in plant and equipment in 1980. (App. M, pp. 11-12).

James Smith, assistant to the Union president, was in charge of the negotiations. Smith sent a letter to Statum, the local Union representative, eight days after the Concession I agreement had already been signed, telling him not to accept the agreement in that form. (App. W, p. 1). Neither Statum or Smith ever tried to correct the omissions in the Concession I agreement and **allowed the same omissions in the Concession II agreement.** Smith warned Statum in the letter:

> "Specifically, Carl, the memo [Concession I Agreement] is **deficient** on two points, which are as follows:
>
> 1. Paragraph (1) on page 1 suspends certain benefits which are not yet effective and restores them on August 28, 1983, unless a new agreement is reached before that date. However, items 8A through 8E on page 7, reduce **quite drastically** wages and benefits which the members currently enjoy. **There is no provision whatsoever in your agreement for the restoration of those wages and benefits which are referred to in paragraph 8 if a new agreement is not reached by August 28 1983.** I do not, of course, know whether this is an oversight or deliberate, **I think it is a serious mistake.**
>
> 2. Far more important than the problem with item (1) above is the problem of paragraph 4A on page 3. 4A defines "suspended benefits."

The definition limits the term to include only those wages and benefits which have been deferred, postponed, delayed, reduced or affected by the provisions of **Paragraphs 1 and 3 above.** This definition because it makes no reference to paragraphs 8A through 8E on page 7, means that when the workers receive the 23 cents an hour and COLA increase scheduled to become effective hereafter, they will not receive the 20 percent wage cut of paragraph 8A nor will they receive any reimbursement for the holidays and vacations sacrificed under paragraph 8A. **Carl, I do not see how we can agree, at this time, to take enormous pay cuts out of people's wages in a steel mill, under a contract which is currently in effect, and tell them that they are never going to get the money back no matter how profitable the Company may become in the future.** [5]

Accordingly, unless Thermon convinces President McBride otherwise, I think it is necessary to correct the agreement with respect to item (2) above, before it is signed to President McBride.

Again, of course, this could simply be an oversight. If so, the Company should have no trouble agreeing to correct it. However, if you have actually agreed to that then I think we have a serious problem that we need to discuss at your earliest convenience. (Emphasis supplied) (App. W, pp. 2,3).

Statum, in violation of Union policy, never submitted the proposed Concession II agreement to the Union International office for review before he signed it. (App. O, pp. 1-2).

Statum wrote a letter on February 16, 1983, to the employ-

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[5]The problem pointed out by Smith clearly became intentional fraud by the Union on the plaintiffs when the Union told the employees that they would get the money back. (See Appendix X, p. 2).

ees which contained the following intentional misrepresentation:

> If we can turn this negative situation around, we have negotiated a payback plan that **insures** you will have returned to you every penny in wages and benefits you are sacrificing now. (Emphasis supplied) (App. X, p. 2).

This was an absolutely false statement and the Union knew it. There is nothing in Concession II that "insures" a repayment of any money. (See Concession II, App. S, pp. 1-6). The employees, not knowing this letter contained absolute falsehoods, voted in favor of Concession II which became effective February 24, 1983. (App. S, pp. 1-6).

The district court granted a summary judgment to all the defendants on all claims. (App. B, p. 1). In the opinion explaining the summary judgment, the district judge stated:

> For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue. (App C, p. 7).

William G. Somerville, III, is the son of William G. Somerville, Jr., one of the partners in the law firm representing both Connors Steel Company and H. K. Porter Company in this litigation. (App. A, p. 23).

William G. Somerville, Jr., was also a law clerk to Judge Lynne as the court of appeals noted in its opinion. (App. A, p. 23) The court found:

> We now turn to the objective facts that might reasonably cause an objective observer to question Judge Lynne's impartiality. First, the close familial relationship between Judge Lynne's law clerk and a senior partner in the firm representing Connors and H.K. Porter might lead an objective observer, especially a lay observer, to believe that Connors and H.K. Porter will receive favorable treatment from the district judge. This is compounded by the observation that William G. Somerville, Jr., is a former law clerk to Judge Lynne.

The attorneys for the plaintiffs did not associate the name of the law clerk with that of his father until the memorandum explaining summary judgment was published. (App. A, p. 26). A motion to recuse the district judge was filed immediately when the relationship was realized. (App. A, p. 26).

It is undisputed that in addition to reviewing the voluminous discovery materials and determining that there were no material issues of fact that would preclude summary judgment, the law clerk actually held a hearing with counsel in the absence of the judge as to the legal positions of the parties and later reported the results of the hearing to the judge. The court of appeals found that there was no dispute that such a hearing had been held by the

law clerk.[6]

The district judge denied the plaintiffs' motion to recuse him under 28 U.S.C. 455(a) and (b), without hearing.

THE HARMLESS ERROR RULE DOES NOT APPLY TO VIOLATIONS OF 28 USC 455(a) WHEN THE JUDGE IS AWARE OF THE DISQUALIFYING FACTS

The court of appeals correctly found that the district judge violated 28 USC 455(a), but erroneously applied the harmless error rule to the wrongful failure of the district judge to recuse himself because it agreed with the merits of the district judge's decision to grant a summary judgment.

The court of appeals believed that because, "The district court dismissed the case on summary judgment," it was in "as good a position to determine the merits of the employees' [plaintiffs] claims as was the district court." Since it agreed with the merits of the decision granting summary judgment, "It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper." (App. A,

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[6] "There does not appear to be any dispute over the fact that Somerville held a hearing in order to determine the legal positions of the parties." And, "Finally, we believe that when Somerville held a hearing in Judge Lynne's absence and later reported the results of the hearing to the judge this contributed to the appearance of impropriety." (App. A, p. 23).

p. 27).

The only authority cited for this proposition is the case of **Liljeberg v. Health Services Acquisition Corporation**, 468 U.S. _____, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). In **Liljeberg,** the court of appeals had earlier affirmed the district judge's decision on the merits, but both the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court were of the opinion that the merits of the ruling were immaterial to the question of whether the case should be reversed and sent to another judge.

In **Liljeberg** the district judge whose conduct was questioned ruled in favor of a litigant so as to ultimately benefit Loyola University, even though it was not a party to the litigation. The judge was a member of the Loyola Board of Trustees. The Fifth Circuit affirmed the decision. The losing party found out ten months later that the judge was a Loyola trustee and moved under Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment on the ground that the district judge was disqualified under 455(a).

The Fifth Circuit vacated the previously affirmed decision and ordered the case heard by another judge on remand. This Court affirmed.

The court of appeals in the instant case held that the proper

remedy for a violation of 455(a) depends on "1) the risk of injustice to the parties in the particular cases; 2) the risk that the denial of relief will produce injustice in other cases; and 3) the risk of undermining the public's confidence in the judicial process." (App. A, p. 26). The court concluded in this case no remedy was necessary.[7]

First, it held there was no risk of injustice to the plaintiffs because it agreed with the district judge's ruling on summary judgment and it reviewed the merits of that decision **de novo**. Thus, a summary judgment, the most publicly suspect of all possible means of disposing of a case, is exempted from the operations of 28 USC 455 altogether, a most anomalous result.[8]

Second, the court of appeals held that "we do not believe that denying relief in this case will produce injustice in other

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[7]The court of appeals also held that "it would be unfair to deprive the Company and the Union of their judgment under the circumstances in this case." (App. A, p. 28). This is insupportable since the Company knew of the facts constituting the 455(a) violation while the plaintiffs did not, and kept silent.

[8] The court of appeals applied this rationale to violations of both 455(a) and 455(b)(5)(iii). The effect of this ruling is to make the remedy where a district judge improperly fails to recuse himself under Sections 455(a) or 455(b)(5)(iii) in a case in which he grants summary judgment against the party entitled to the recusal turn on whether or not the court of appeals agrees with the granting of summary judgment. This simply nullifies the application of 28 U.S.C. Section 455 in summary judgment cases. Obviously, if the court of appeals does not agree with the district court granting summary judgment, then the court of appeals is obligated to reverse the judgment without reference to whether or not there is a Section 455 violation.

cases." Two grounds for this belief were stated. First, "Provided Judge Lynne refrains in the future from using law clerks to hold hearings with counsel or using law clerks whose impartiality might be questioned, there is no risk of injustice in future cases." Second, "since this case was decided on summary judgment our decision will not produce any injustice in future cases." (App. A, p. 28).

Judge Lynne was already the subject of a 455(a) opinion from the court of appeals on the dangers of using law clerks with a special relationship to one of the law firms in a case when he did it again in the instant case. In **Phillips v. Amoco Oil Company**, 799 F. 2d 1464 (11th Cir. 1986), another summary judgment case, the losing party "claimed that an appearance of impropriety arose when the law clerk who had drafted Judge Lynne's memorandum opinion accepted employment with the firm representing [the prevailing party] **prior to drafting the opinion**." (Emphasis supplied)(799 F. 2d at 1467). The court of appeals excused this because the losing lawyers knew some months earlier that the law clerk had accepted employment with these lawyers. The losing party argued that it did not know the clerk had drafted the opinion until it was issued and recited this fact.

The summary judgment was entered in the instant case on

July 31, 1987, long after the **Phillips** opinion was issued, yet that opinion did not seem to have any effect on Judge Lynne's practices relative to "interested" law clerks working on opinions in summary judgment cases. What is the basis for the present optimism? The Eleventh Circuit now holds that where it agrees with a district judge on a summary judgment, there is no harm done by allowing a law clerk related to the winning lawyers to work on the case, analyze massive discovery and even hold hearings with the lawyers in the absence of the judge. Since Judge Lynne would not grant a summary judgment he does not believe is correct, the instant opinion seems unlikely to promote change.[9] Such a rule of law must raise the appearance of impropriety in the mind of an objective observer and create the risk of undermining the public's confidence in the judicial process. (**Liljeberg**, 100 L. Ed. 2d at 875).

This is particularly true where, as here, the father of the law clerk in question is not only a senior partner in the law firm representing the Company, but is also a former law clerk of Judge Lynne. The court of appeals correctly finds this to be an additional indicia of impropriety and lack of impartiality in the public mind.

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[9] The court of appeals noted that "Judge Lynne's practice of giving credit to his law clerk in a footnote may erroneously lead some to believe that the law clerk decided the case." (App. A, p. 23).

(App. A, p. 23).

Third, the court of appeals held that the public confidence in the judicial process would not be undermined by its holding that the 455(a) violation was harmless error:

> "Since we have determined that in fact a violation occurred and strongly urge Judge Lynne to discontinue his practice of **crediting** the work of his law clerks, we believe that our decision will instill greater confidence in our judiciary. To the extent that public confidence has already been undermined we do not believe that granting relief in this case will change the public's perception in any appreciable way." (Emphasis supplied)(App. A, p. 28).

Surely, this was written tongue-in-cheek. The emphasized portion of this statement urges Judge Lynne only to stop "crediting" the work of his law clerks, not to stop the law clerks from performing the work. How can such a direction as that restore public confidence? Moreover, there is no reason to the statement that if Judge Lynne has already undermined public confidence by what he has done, that confidence cannot be repaired by reversing this case and assigning it to another judge.

This case involves a putative class of 600 employees, all living in one community. These employees, plus the concerned members of their families, make up a very substantial number of people whose rights were **admittedly** adjudicated by a federal

judge in violation of 455(a). Does this Court believe that objective members of the community would not have reasonable cause to question the impartiality of such courts?

This Court said in **Liljeberg**, "The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." (100 L. Ed. 2d at 875). What is the purpose of Section 455(a)? "The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (Id.) Applying this standard, it is beyond doubt that this case must be reversed and reassigned to another Judge. [10]

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[10] It is true that in **Liljeberg** this Court stated that "there need not be a draconian remedy for every violation of Section 455(a)." (100 L. Ed. 2d at 873-874). Moreover, this court stated that "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." (Id.) The court of appeals relies heavily on these statements, neither of which have any application to the instant case. This Court was speaking in the context of a judge who did not know of a circumstance that disqualified him. The court of apeals is disingenuous when it says, "In **Liljeberg** the Supreme Court made it clear that harmless error analysis would be appropriate for a [Section] 455(a) violation." (App. A, p. 29). The harmless error analysis referred to in **Liljeberg** had to do with a situation in which the judge did not know of a disqualification and could not therefore be influenced by it in making the decision. But, even this type of error may not be harmless. This Court said: "it would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges." (100 L. Ed. 2d at 874). The "harmless error" rationale the court of appeals attempts to extrapolate from **Liljeberg** is unsupportable.

DISQUALIFICATION UNDER 28 USC 455(b)(5) IS AUTOMATIC AND UNCONDITIONAL: THE HARMLESS ERROR RULE HAS NO APPLICATION IN SUCH CASES

Unlike most recusal cases, the law clerk in this case knew something of great importance that the judge knew only second hand through the law clerk-what the parties stated their legal positions to be at a hearing held by the law clerk at the judge's direction, but in the judge's absence. The law clerk became the judge!

Section 455(b)(5)(iii) automatically disqualifies a judge whose father is a member of a law firm in the case. Since the law clerk in this case acted as the alter ego of the judge in at least one hearing, as well as in analyzing "massive discovery materials" and "formulating" the summary judgment opinion, the same rule should apply to the court under these circumstances.

In **Hall v. Small Business Administration**, 695 F. 2d 175 (5th Cir. 1983) the Fifth Circuit held that a magistrate's disqualification was required under 28 USC Section 455 where the magistrate's law clerk had been a member of the plaintiff class and had agreed to be employed in the future by counsel representing the plaintiff in a proceeding before the magistrate:

> "Law clerks are not merely the judge's errand runners. They are sounding boards for tentative

> opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be. **Fredonia Broadcasting Corp.**, 569 F.2d at 256. **We agree with the Sixth Circuit that the clerk is forbidden to do all that is prohibited to the judge. See Price Brothers Co. v. Philadelphia Gear Corp.**, 629 F.2d 444, 447 (6th Cir. 1980), ***cert. denied,*** 454 U.S. 1099, 102 S.Ct. 674, 70 L.Ed.2d 641 (1981)." (Emphasis supplied)(695 F. 2d at 179)

In **SCA Services, Inc. v. Morgan,** 557 F. 2d 110 (7th Cir. 1977), Judge Morgan was assigned to a case in which his brother's law firm represented one of the parties. The other party to the action moved for the disqualification of Judge Morgan. The Seventh Circuit held that under the well settled principles of agency and partnership, even if the judge's brother did not actively participate in the case, the appearance of his law firm was in law an appearance of **every** lawyer in the firm. [11]

In **Potashnick v. Port City Construction Company**, 609 F. 2d 1101 (5th Cir. 1980), [12] Judge Hand was reversed for failure to

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[11] The Seventh Circuit also found that even if the outcome of the case made absolutely no financial difference to the law firm, its reputation and good will could be affected by a favorable versus an unfavorable decision, citing the Congressional drafts of the amendments to Section 455 which recognized that non-economic interests may affect a judge's bias or prejudice. The court concluded that the provisions of 455(b) are mandatory and require recusal where applicable **regardless of other circumstances.** (577 F. 2d at 116-117)

[12] This case is binding on the Eleventh Circuit under the doctrine of **Bonner v. City of Prichard**, 661 F. 2d 1206 (11th Cir. 1981).

recuse himself under 28 USC Section 455(b)(5)(iii) when one of the parties was represented by a law firm in which his father was a senior partner. Recusal was required even though the motion was not made until the end of a lengthy trial and counsel for all parties had known of the relationship since the case was filed. The court held that the 455(b)(5)(iii) disability could not be waived and required, regardless of other considerations, that the judge be recused.

A judge who is related in the third degree to any attorney representing a party before that judge is **automatically** disqualified. In **McCuin v. Texas Power & Light Company**, 714 F. 2d 1255 (5th Cir. 1983), the court discussed the congressional intent in adopting 28 USC 455(b)(5):

> Before Congress amended the judicial disqualification statute in 1974, a judge's kinship to a lawyer appearing before him did not automatically require the judge's recusal. The statute provided simply that the judge was to disqualify himself if the relationship would "render it improper, in his opinion, for him to sit. . . ." In a report recommending a change in the statute, a House of Representatives Committee criticized this standard because it "made the judge himself the sole decider of . . . the relationships which would be improper and lead to disqualification." Congress, therefore, amended the statute to **mandate** the judge's disqualification in cases in which a person related within the third degree to the

> judge or the judge's spouse is acting as a lawyer or has a substantial interest in the outcome of the proceedings.
> The legislative history of the amendment of Section 455 indicates that Congress' purpose was to adopt a categorical rule that would be self-enforcing. In Potashnick, we noted that Section 455 makes it the judge's duty to disqualify himself as soon as he is aware that the grounds exist. The mandate is made inexorable by an express prohibition against waiver. (Emphasis supplied)(714 F. 2d at 1259)

The Fifth Circuit correctly cites the case of **United States v. Conforte**, 624 F. 2d 869, 880 (9th Cir. 1980) for the proposition that 455(b)(5) imposes a self-enforcing duty on the judge to disqualify himself and that the disability cannot be waived.[13]

The Eleventh Circuit in the instant case states a different rule in 455(b) cases than the congress and the other courts of

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[13] The Judicial Conference disapproved the non-waiver provisions of 455(b) and argued that there should be a provision for waiver where that "may in a particular case be advantageous to the litigants and in the best interests of the administration of justice." **Report of the Joint Committee on the Code of Judicial Conduct**, 1974 U.S. Code Cong. & Admin. News 6351, 6361.

> The congressional drafters rejected this approach and stated: "... a kinship within the third degree cannot be waived under the provisions of this bill. While the ABA canon on disqualification would permit waiver in th[is] instance [ ], the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace ... a ... judge who becomes disqualified." H. R. Rep. No. 1453, 93d Cong., 1st Sess. (973), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6352.

appeal-to have the need for recusal in summary judgment cases turn on the merits of the judge's decision. This gives the disqualified district judge the option of recusing himself under 455(b) or staying in the case because he believes it can be disposed of on summary judgment. If the court of appeals agrees with summary judgment, the public sees a judge deciding a case in favor of his relative without a trial. If the court of appeals disagrees, the case is reversed on the merits.

Moreover, the decision on a summary judgment generally cannot be made until extensive discovery has been undertaken. This means that the lawyer will be appearing before his judicial relative for rulings on the plethora of decisions a judge makes during discovery.

SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE PLAINTIFFS' FRAUD CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

The court of appeals ruled the state law fraud claims were preempted citing **San Diego Building Trades Council v. Garmon,** 59 U.S. 263 3 L. Ed. 2d 775 779 S. Ct. 773 (1959) **Garmon** held that, "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice

under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." (359 U.S. at 244, 3 L. Ed. 2d at 782) **Garmon** recognized exceptions. One is, "... where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S. at 244, 3 L. Ed. 2d at 782) This Court in **Belknap, Inc. v. Hale**, 463 U.S. 491, 103 St. Ct. 3172, 77 L. Ed. 2d 798 (1983) recognized state law claims of fraud and breach of contract as an exception.

The court of appeals adopted **Serrano v. Jones & Laughlin Steel Company**, 790 F. 2d 1279 (6th Cir. 1986), to distinguish **Belknap**. **Serrano** has no application.[14]

The failure of the Union to fairly represent the employees in the instant case meant that the employees were without any representation. The state certainly has a **Garmon** exception interest in

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[14] The misrepresentations in **Serrano** were that the employer had promised persons brought in to replace striking workers that they would not be fired if a settlement with the union was reached and the strikers returned to work. The union made replacement of the "strike breakers" a condition of settlement and the employer capitulated. The "strike breakers" were the plaintiffs. **Serrano** was not a suit jointly against the union and the employer and did not involve claims by the plaintiffs that the union had failed in its duty to represent. The company brought the union into the case as a third party defendant. There was no claim in **Serrano** that the representation process under the NLRA had failed. The alleged "misrepresentations" were actually a breach of contract claim.

seeing that a large group of its citizens who have been defrauded of very substantial salary and benefits have some remedy. This Court made that clear in **Linn v. United Plant Guard Workers**, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).[15]

SUMMARY JUDGEMENT WAS IMPROPER UNDER SECTION 301 AND 28 USC SECTION 1337

The Ninth Circuit, in **ACRI v. International Ass'n. of Machinists**, 781 F. 2d 1393 (9th Cir. 1986) held that "[a] union's duty of fair representation extends to conduct during the negotiation or administration of collective bargaining agreements." (781 F. 2d at 1397)[16] In **Vaca v. Sipes**, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), this Court held that unfair representation claims against unions are not preempted by the NLRA. If the unfair representation claims against the unions are not preempted, then claims against the employer should not be preempted. Thus a hybrid Section 301 duty of fair representation claim is stated against the Union for failure of fair representation and against the Company under Section 301.

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[15] This Court held that the inability of the NLRB to grant effective relief "aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim take matters into his own hands." (383 U.S. at 64, n. 6)

[16] Citing **Retana v. Apartment, Motel, Hotel & Elevator Operators' Union, Local No. 14**, 453 F.2d 1018, 1023-24 (9th Cir. 1972).

The plaintiffs also state a claim under **DelCostello v. Teamsters**, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476, (1983), that the Company breached the employment contract and that the Union breached its duty of fair representation. (462 U.S. at 165.) Such a claim is independent of hybrid Section 301/breach of duty of fair representation claims. See, e.g., **Berialt v. Local 40, Super Cargos & Checkers of I.L, & W.U.**, 501 F. 2d 258, 264 (9th Cir. 1974); **Retana v. Apartment, Motel, Hotel & Elevator Operators' Union**, 453 F. 2d 1018, 1021-1022 (9th Cir. 1972).

Claims for breach of the duty of fair representation in the negotiation and ratification of the concessions in the instant case are also not preempted by the NLRA. This issue was dealt with directly in **Berialt v. Local 40, Super Cargos & Checkers of I.L. & W.U., supra**, where the court held that **Amalgamated Association of Street Employees v. Lockridge**, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971), established that claims for breach of duty of fair representation in negotiating contract agreements brought under 28 USC Section 1337 were not preempted by the NLRA, just as hybrid Section 301/duty of fair representation claims are not preempted. **Vaca v. Sipes, supra.**

SUMMARY JUDGMENT WAS IMPROPER UNDER THE PLAINTIFFS' CLAIMS OF BREACH OF THE DUTY OF FAIR REPRESENTATION IN THE NEGOTIATION PROCESS

The plaintiffs allege that the Union breached its duty of fair representation in negotiating the two concession agreements. **Berialt v. Local 40, Super Cargos & Checkers of I.L. & W.V., supra**, recognized that a union's duty to fairly represent the interests of its members and to fulfill its fiduciary duty extends to the negotiation process. Moreover, since breach of the duty of fair representation in negotiating the contract necessarily infects the terms of the contract, the failure to exhaust the grievance procedure does not bar a federal court action. A union has a duty to investigate the claims of an employee against an employer in the grievance procedure context. **Turner v. Airtransport Dispatcher's Association**, 468 F. 2d 297 (5th Cir. 1972); **Freeman v. O'Neal Steel, Inc.**, 409 F. 2d 1123 (5th Cir. 1980). This duty to investigate must be imposed on the Union in the negotiation process as well. There is substantial evidence in this case the Union intentionally or recklessly failed in that duty.

SUMMARY JUDGMENT WAS IMPROPER UNDER THE PLAINTIFFS' CLAIMS OF BREACH OF THE DUTY OF FAIR REPRESENTATION IN THE RATIFICATION PROCESS

The plaintiffs' claims of breach of duty of fair representation is clearly supported in this case by substantial evidence because the Union representatives made intentional or reckless misrepresentations to the employees during the concession ratification process. **Anderson v. United Paperworkers International Union,** 641 F. 2d 574, 574-578 (8th Cir. 1981); **Deboles v. Transworld Airlines**, 552 F. 2d 1005, 1018 (3rd Cir.), cert. denied 434 U.S. 837, 98 S, Ct. 126, 54 L. Ed. 2d 98 (1977).

At least three of the federal circuit courts of appeal have recognized a union's duty not to misrepresent the union's bargaining efforts and position in order to induce ratification of a newly negotiated collective bargaining agreement. See, **Anderson v. United Paperworkers International Union**, 641 F. 2d 574, 577 (8th Cir. 1981); **Deboles v. Transworld Airlines, Inc.**, 552 F. 2d 1005, 1018-20 (3rd Cir. 1977), **cert. denied**, 434 U.S. 837, 98 S. Ct.126, 54 L. Ed. 2d 98 (1977); **Retana v. Motel, Hotel & Elevator Operators' Union, Local No. 14**, 453 F. 2d 1018, 1023-24 (9th Cir. 1972).

In **Deboles, supra**, the Third Circuit reiterated the requirement that the union "adhere to the fiduciary standards inherent in

its position as bargaining agent." **Deboles**, 551 F. 2d at 1019 (citing, **Brady v. Transworld Airlines, Inc.**, 401 F. 2d 87, 94 (3rd Cir. 1968), cert denied, 392 U.S. 1048, 89 S. Ct. 680, 21 L. Ed. 2d 691 (1969). **Deboles** clearly states that the union has a fiduciary duty to fairly represent the terms of a proposed contract agreement to members during the ratification process.

CONCLUSION

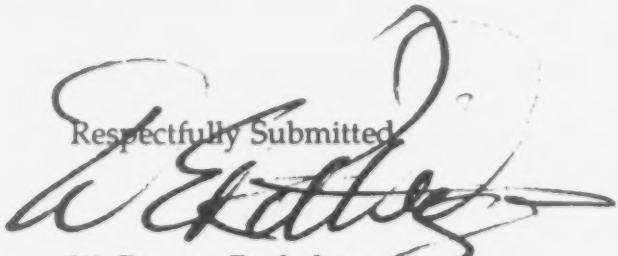
The court of appeals opinion is based on a misunderstanding of the reasons for the recusal rules of 28 USC 455(a). In **Liljeberg** this Court made it clear that the decisive factor in deciding such cases is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (100 L.Ed 2d at 875). The court of appeals attempts to supplant this test with an evaluation of the merits of the decision made by the disqualified judge to determine whether the substantive result would be changed by reversing and assigning the case to another judge. These two tests are incompatible and the **Liljeberg** test must prevail unless this Court is prepared to disregard the legislative mandate embodied in 455(a).

The ruling of the court of appeals as to 455(b)(5)(iii) is simply wrong. The court of appeals did not decide whether

455(b)(5)(iii) applied, merely holding that in any event the harmless error rule would make the question moot in this case. This is simply to disregard the legislative history of the statute and all the cases decided under it. The court of appeals seems to want a return to the old duty to sit rule and the discretionary recusal rules. The amendments to 455 make that impossible.

Moreover, the court of appeals is wrong in affirming the summary judgment awarded by the disqualified judge. There are serious legal errors as well as factual ones in the opinion. The limitations of space in this Petition for Certiorari make it impossible to include an analysis of more than a fraction of the evidence gathered in the "massive discovery" conducted in this case. **No appellate court can ever review the discovery in a complex case such as this to the same degree as can the district judge and that is just another reason why that all-important task cannot be assigned to a law clerk whose father is one of the lawyers in the case!**

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to all counsel of record on this the 14th day of March, 1989.

Of Counsel